

APPEAL NO. 021652
FILED JULY 18, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on June 6, 2002. The hearing officer determined that the appellant's (claimant) request for spinal surgery should not be approved, and that the respondent (carrier) is not liable for the cost of spinal surgery. The claimant appeals, asserting that since he had undergone all of the additional testing recommended by the second opinion doctors, the presumptive weight accorded the two nonconcurring opinions regarding spinal surgery was overcome, and, therefore, the spinal surgery should have been approved. The carrier urges affirmance of the hearing officer's decision.

DECISION

Affirmed.

The hearing officer did not err in determining that the carrier is not liable for the costs of the recommended spinal surgery. Section 408.026(a)(1), provides that, except in a medical emergency, an insurance carrier is liable for medical costs related to spinal surgery only if before surgery, the employee obtains from a doctor approved by the carrier or the Texas Workers' Compensation Commission a second opinion that concurs with the treating doctor's recommendation. Presumptive weight will be given to the two concurring opinions and they will be upheld unless the great weight of medical evidence is to the contrary. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.206(k)(4) (Rule 133.206(k)(4)). Dr. B, the claimant's surgeon, recommended spinal surgery at two levels. Neither Dr. K, the carrier's second opinion doctor, nor Dr. C, the claimant's second opinion doctor, concurred with the recommended surgery. Dr. K recommended that a number of diagnostic tests be completed, concluding his opinion with the comment that "I will not proceed with surgical intervention prior to these studies being provided." Dr. C, in her report dated April 5, 2002, recommended against the proposed cervical surgery, but did "recommend physical therapy with follow-up EMG and nerve conduction velocity in six months to rule out any interval changes."

The claimant urges reversal of the hearing officer's determination because he has undergone the additional testing recommended by the second opinion doctors. At this point, however, none of the doctors involved in the spinal surgery decision has submitted any additional evaluation of the claimant's situation in light of the additional testing. What the hearing officer had before her was the original recommendation for surgery, two nonconcurrences with that original recommendation, and some additional test results which were not submitted to the nonconcurring doctors for their evaluation. In view of the medical evidence presented, we cannot conclude that the hearing officer's determination is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

We affirm the decision and order of the hearing officer.

The true corporate name of the insurance carrier is **ZURICH AMERICAN INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**GARY SUDOL
9330 LBJ FREEWAY, SUITE 1200
DALLAS, TEXAS 75243.**

Michael B. McShane
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Robert W. Potts
Appeals Judge